

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
SBC's And VarTec's Petitions for Declaratory	)	WC Docket No. 05-276
Ruling Regarding the Application of Access	)	
Charges to IP-Transported Calls	)	

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

The National Association of State Utility Consumer Advocates ("NASUCA")<sup>1</sup> files these brief comments in response to the Public Notice in this docket dated September 26, 2005.<sup>2</sup> In the Public Notice, the Federal Communications Commission ("Commission") requested comments on separate petitions for declaratory ruling filed by the SBC incumbent local exchange companies ("SBC") and by VarTec Telecom Inc. ("VarTec"), pursuant to 47 C.F.R. § 1.2. The petitions contain assertions for and against carriers' responsibilities for paying access charges when calls are transported using Internet protocol ("IP"). Consistent with its positions expressed in WC

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<sup>1</sup> NASUCA is a voluntary association of 44 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

<sup>2</sup> FCC 05-2514.

Docket 01-92,<sup>3</sup> NASUCA comments that, in the absence of individualized agreement otherwise, carriers that use the networks of other carriers to complete calls are responsible for compensating the other carriers for the use of their networks. This is true regardless of whether the calls are in IP format.

As described in the Public Notice, on September 21, 2005, SBC filed a petition for declaratory ruling that wholesale transmission providers using IP technology to transport long distance calls are liable for access charges payable to SBC.<sup>4</sup> SBC filed its petition after the United States District Court for the Eastern District of Missouri dismissed without prejudice SBC's claims seeking payment of access charges for long distance calls that were transported using IP technology.<sup>5</sup> The court found it appropriate to defer the issues raised by SBC to the primary jurisdiction of the Commission.<sup>6</sup> In its petition, SBC sought a declaratory ruling that wholesale transmission providers using IP technology to carry long distance calls that originate and terminate on the public switched telephone network ("PSTN") are liable for access charges under the Commission's rules<sup>7</sup> and applicable tariffs.<sup>8</sup> SBC seeks a ruling that providers meeting these criteria are interexchange carriers.<sup>9</sup>

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<sup>3</sup> See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the National Association of State Utility Consumer Advocates (May 23, 2005); *id.*, Reply Comments of the National Association of State Utility Consumer Advocates (July 20, 2005).

<sup>4</sup> Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges (filed Sept. 21, 2005) ("SBC Petition"). This filing corrected and replaced an earlier petition that SBC had filed on September 19, 2005.

<sup>5</sup> *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ), 2005 WL 2033416 (E.D. Mo. Aug. 23, 2005). The defendants from which SBC sought payment were VarTec; UniPoint Enhanced Services, Inc. (d/b/a PointOne), UniPoint Services, Inc., and UniPoint Holdings, Inc. (collectively, "PointOne"); and Transcom Communications, Inc. and Transcom Holdings, LLC.

<sup>6</sup> *Id.* at \*4.

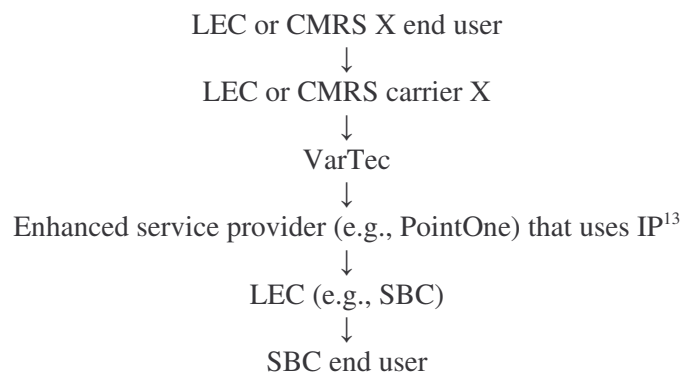
<sup>7</sup> 47 C.F.R. § 69.5.

<sup>8</sup> SBC Petition at 17-24.

<sup>9</sup> *Id.* at 17-35.

On August 20, 2004, VarTec had filed a petition for declaratory ruling on related issues.<sup>10</sup> Specifically, VarTec sought a declaratory ruling that it is not required to pay access charges to terminating local exchange carriers (“LECs”) generally when enhanced service providers or other carriers deliver calls directly to the terminating LECs for termination.<sup>11</sup> VarTec also sought a declaratory ruling that terminating LECs are required to pay VarTec for the transiting service VarTec provides when terminating LECs terminate intraMTA calls originated by a CMRS provider.<sup>12</sup>

Although neither petition is a model of clarity when it comes to describing the transmission at issue here (and hence describing the possible transactions involved), the following would appear to be the path of communication:



See VarTec Petition at ii; SBC Petition at 2-3.

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<sup>10</sup> Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination (filed Aug. 20, 2004) (“VarTec Petition”). NASUCA notes that the Commission failed to act on VarTec’s petition for over a year. VarTec also sought a declaratory ruling that such calls are exempt from access charges when they are originated by a commercial mobile radio service (“CMRS”) provider and do not cross major trading area boundaries. *Id.* at 8-11. NASUCA does not comment on this issue.

<sup>11</sup> *Id.* at 1, 3-8.

<sup>12</sup> *Id.* at 1-2, 11-12.

<sup>13</sup> NASUCA uses the term “enhanced service provider” here advisedly, as that term is used in the petitions. As argued here, the function performed in the diagram by, e.g., PointOne, should not be exempt from paying compensation whether or not PointOne’s service is really “enhanced,” rather than being a mere protocol change in the course of transmission.

SBC's position is that the Internet service provider must pay compensation to SBC for calls delivered to SBC's end user.<sup>14</sup> VarTec's position is that VarTec should not be required to pay compensation to SBC for those calls.<sup>15</sup> They are both right. On the other hand, SBC's position here is fundamentally at odds with its position as a member of the Inter-carrier Compensation Forum ("ICF"), which would reduce all transactions between carriers to mandatory bill-and-keep, where no money changes hands despite the exchange of traffic.<sup>16</sup>

Simply put, in the absence of carrier-specific agreement to the contrary, each carrier that terminates traffic on another carrier's network or uses the other carrier's network for transit should pay compensation to the other carrier. Thus in the diagram above, LEC or CMRS carrier X should pay compensation to VarTec, VarTec should pay compensation to PointOne, and PointOne should pay compensation to SBC.

This proposition should hold true unless one of the intermediate carriers has a direct service relationship with the end user. In that event, the carriers in between the caller and its intermediate carrier should not be required to pay compensation to the intermediate carrier. Thus in a traditional customer-to-interexchange carrier ("IXC") relationship, as presumably is the case with VarTec, the end user is the IXC's (VarTec's) customer, and the IXC (VarTec) is responsible for paying compensation to the next carrier "down the line" (e.g., PointOne in the diagram).

It appears that PointOne and some other similar carriers are holding themselves to be exempt from paying compensation to SBC.<sup>17</sup> SBC correctly points out that the Commission held

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<sup>14</sup> NASUCA will not address here whether that compensation should be at "access charge" levels, or what the appropriate level of compensation should be.

<sup>15</sup> On the other hand, VarTec also argues that SBC is required to pay VarTec for the transiting service it provides. That compensation should come from carrier X, whose end user initiated the call, or from the end user if VarTec's customer.

<sup>16</sup> There remains the question of whether VarTec could be required to pay originating access charges to LEC X. That question, however, is really outside the scope of the petitions and the Public Notice, and will not be addressed here.

<sup>17</sup> See SBC Petition at 1.

in the *AT&T Order* that the fact of conversion to IP in the course of transmission of a call does not exempt the call from access charges.<sup>18</sup> Consistent with the principles articulated here, PointOne should be required to pay compensation to SBC.

It may be that PointOne's arrangements with VarTec are not premised on PointOne having to pay compensation to SBC.<sup>19</sup> That should not excuse the payment to SBC, however, and would merely require reformation of the VarTec/PointOne arrangement.

Finally, this issue of transit carriage points out one of the fundamental flaws in a default bill-and-keep regime like that proposed by the ICF. Bill-and-keep assumes that each carrier will be able to recover all of its network costs from its end users. But IXC's and transiting carriers -- like VarTec and PointOne -- do not actually have end users directly connected to their networks. Thus either they must separately contract with the end user, as VarTec presumably does with the Carrier X customers for whom it provides long distance service, or the transiting carrier must seek compensation from other carriers -- as PointOne should do from VarTec.<sup>20</sup>

A mandatory bill-and-keep system thus only works where the two interconnecting carriers have end users or a direct relationship with the end user. There is no logically or equitably consistent way to ensure that there will be adequate compensation for use of the various networks in a mandatory bill-and-keep regime. It is, of course, perfectly appropriate for carriers to mutually agree that interchange of traffic will not involve exchange of compensation, but a regime without compensation should not, contrary to the ICF position, be forced on any carrier.

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<sup>18</sup> *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) ("AT&T Order").

<sup>19</sup> SBC notes that the VarTec/PointOne agreement contemplates the possibility of such compensation. SBC Petition at 22.

<sup>20</sup> This presumes that PointOne does not have a direct customer relationship with Carrier X's end user.

Respectfully submitted,

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